No. 70-31

In The

Supreme Court of the United States

OCTOBER TERM 1970

PORT OF PORTLAND, et al.,
Appellants,

vs.

UNITED STATES OF AMERICA, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

BRIEF OF APPELLEES, SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY AND UNION PACIFIC RAILROAD COMPANY

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APPELLEES' STATEMENT

The purpose of the statement of appellees Union Pacific Railroad Company (UP) and Spokane, Portland and Seattle Railway Company (SP&S)[1] is to supplement and, where in conflict, modify or correct the statements of appellants.

[1]Since the commencement of this case the Great Northern Railway Company (GN) and Northern Pacific Railway Company (NP), parents of SP&S have merged into Burlington Northern Inc. (Burlington Northern). However, when dealing with track rights, car interchange and other railroad operations, we will often speak of the predecessor lines.

1. Peninsula Terminal Company

Additional history should put the case in better focus. Peninsula is a small terminal railroad located north of Portland, Multnomah County, Oregon, with 3.79 miles of main, side and interchange track from which it currently serves 14 industries.

The attached Portland area map is a summary of information contained in Exhibit 58 and will aid in orienting the location of various geographic points and rail facilities in the Portland area.

Peninsula owns 13.17 acres of land worth $107,000 and other assets valued at $184,210. Peninsula's trackage connects with the SP&S and UP main lines through a yard designated "North Portland." Peninsula's trackage extends easterly approximately one-half mile from the North Portland Interchange Yard. Its main line track cuts through and curves beneath the fill of the SP&S main line and from there extends in a westerly direction slightly over one-half mile from the North Portland Interchange Yard. This western extremity of Peninsula's main line connects with an industry spur track serving the Crown Zellerbach Company (Crown) pole yard, located within the Rivergate Industrial District (Rivergate) of the Port of Portland (Port).

All outstanding capital stock of Peninsula is now owned by the United Stockyards Corporation (United). At the time United acquired the stock of Peninsula, it needed Peninsula's service as a terminal railroad for the purpose of serving its public stockyards at North Portland. As the Portland public stockyard business has

declined, the need for retaining ownership in Peninsula has become less pronounced.

UP and SP&S connect directly at North Portland where they interchange traffic and formerly served local industries. Their service in the area dates back to 1908. Initially, each carrier performed its own switching in overlapping and duplicating service. In 1915, this was alternated at two-year intervals.

Peninsula was organized in 1918 and thereafter constructed trackage to furnish switching service to the North Portland industrial district. Switching operations were carried on jointly by SP&S and UP until 1930 when Peninsula, without objection from its lessees, obtained Commission approval for operation of its trackage as a terminal railroad. See *Peninsula Terminal Company Operation*, 166 ICC 597 (1930). Acquisition of control of Peninsula by United was approved by the Commission in *Stockyards Railroad Company et al. Control*, 254 ICC 207 (1943).

Since 1912, SP&S, its parent lines, and UP have maintained a joint agency located in the same building with Peninsula's office for the handling of business for the SP&S, NP, GN and UP. These four trunk lines also maintain a yard office in the North Portland Yard. Both offices facilitate the interchange of cars between the four trunk line carriers and between each such carrier and Peninsula. All joint expenses are prorated on a car-count basis.

Attached as a second map is a drawing of the North Portland-Peninsula area track layout based on Exhibit

NSW-1 attached to Exhibit 26 (App 262). For many years this interchange yard has been and now is used by SP&S, NP and GN on the one hand, and UP on the other for interchange of traffic, and also by all four of these lines for interchange with Peninsula Terminal. These tracks provide a direct physical connection between the SP&S-NP-owned main line, or the UP-owned main line on the one hand and fully owned trackage of Peninsula on the other. Portions of this trackage were constructed as early as 1908 and the present layout in general has existed since 1931.

At the time of the application United was in the process of withdrawing from its rail operations (App 283). Thus, on several occasions consideration was given to the acquisition of Peninsula by UP or SP&S. One such occasion occurred in 1963 when United indicated to SP&S that it was disinterested in its railroad operations and proffered a recent appraisal of Peninsula properties as a proposed basis for sale. These negotiations did not produce an agreement. Again in 1966 United affirmed its willingness to sell (App 264) and the negotiations were opened between principals of SP&S and United only. However, when informed of such negotiations, UP decided to participate.

With this history and relationship SP&S and UP are the logical purchasers of Peninsula.

2. Rail Service to Rivergate and Peninsula

The UP and SP&S-NP are the only trunk line railroads physically connecting with Peninsula at the North Portland interchange tracks. At the time of the hearing

the cars of the GN and NP were interchanged with UP or Peninsula at North Portland although they were physically moved by SP&S from Vancouver, Washington (App 390).

SP reaches Rivergate by connection (1) with UP at East Portland (Ex 1, p 6-1, App 212), and (2) with the SP&S via the Depot Yard of the Portland Terminal Railroad Company (Portland Terminal) (App 502-3) on the west side of the Willamette River. At the time of hearing, Milwaukee service was available as a connecting line (Ex 28, p 3, App 280). Now that Milwaukee serves Portland directly, it can reach Peninsula through a number of options including a switching interchange with SP&S at East St. Johns, less than a mile away (App 391).

Rail service to Rivergate through the southwest gateway is furnished by SP&S-UP for themselves and SP and Milwaukee as connecting lines, with the UP performing the actual switching service. An agreement effective January 22, 1960 and executed May 26, 1967 (App 303), between the OWR&N-UP and SP&S provides for the service and reflects a letter commitment by the two railroads with the Port dated January 19, 1960 (App 295), as supplemented by a further letter of commitment dated May 25, 1960 (App 298).

The route for furnishing rail service to North Rivergate is yet to be determined. All public agencies involved assumed that Peninsula would operate into North Rivergate, although the Port when given the opportunity,

would not say which route it preferred (App 245).[2] As found by the Commission, service to North Rivergate could be "based upon the possible construction on the eastern side of Rivergate of an SP&S main line extension or an extension of Peninsula's track into the area" (App 15). Under Article XIV of the May 26, 1967 agreement and the provisions of the May 25, 1960 letter, if at any time Rivergate is served by trackage springing from the main line of the SP&S, the SP&S will admit the UP to joint ownership and use thereof on terms substantially the same as extended to the SP&S at the southwest gateway.

Six industries occupy 265 acres, or slightly less than one-tenth of the Rivergate area (App 15) and the balance is under development.

At the time of hearing the rail carriers performing line-haul service in connection with Peninsula traffic absorbed switching charges, with minor exceptions for some SP local noncompetitive traffic (App 254; 285; 512-514). The railroads serving the North Portland territory have now established a single basis of switching charges at all common points within the states of Northern Idaho, Oregon and Washington on competitive and noncompetitive carload traffic, and switching charges are absorbed by the line-haul carriers, with two exceptions:

1. A minimum line-haul revenue of $100 per car after absorption must be maintained, and

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[2]The Port's consultant in a $400,000 planning study made in September 1967 recommended a route connecting with the SP&S main line (App 282).

2. Switching charges will not be absorbed where tariff rate items specifically exclude such absorptions.[3]

The second exception reserves to the carriers the right to publish low rates to meet other competitive modes of transportation (App 286).

Milwaukee began absorbing the Portland switch charges on the same basis at points it considered off line on March 22, 1971,[4] the date Milwaukee extended service to Portland. In practice, reciprocal switching means that one line-haul carrier will act as a switching carrier in placing cars at industries via its own trackage as an incident of the line-haul movement of those cars by another carrier whose trackage does not extend to the served territory.

The carriers reciprocate in the roles as switching and line-haul carriers in accordance with the flow of traffic to and from industries on the respective trackage. In theory, the carriers mutually exchange their switching services in these terminal areas with the effect of extending the lines of each carrier to the other industries—even on traffic for which they may be directly competitive as line-haul carriers. See *Switching Charges and*

[3]These switch charge absorptions were published effective December 5, 1969 in the following Rail Tariffs:
Chicago, M.St.P.&P.R. Co.—Tariff No. 11606, I.C.C. No. B-8197.
Great Northern Ry.—Tariff No. 1216-L, I.C.C. No. A-9360.
Northern Pacific Ry.—Tariff No. 66-Y, I.C.C. No. 9999.
Oregon Electric Ry.—Tariff No. 64-L, I.C.C. No. F-174.
Portland Traction Co.—Tariff No. 1-B, I.C.C. No. 36.
Southern Pacific Co.—Tariff No. 230-K, I.C.C. No. 4960.
Spokane, Portland and Seattle Ry.—Tariff No. 434-R, I.C.C. No. 774. Tariff No. 1072-K, I.C.C. No. 770.
Union Pacific R. Co.—Tariff No. 9000-G, I.C.C. No. 5651.

[4]Chicago, M.St.P.&P.R. Co. Tariff No. 11606-ICC B-8197, Supplement 14, March 22, 1971.

Absorption Thereof at Shreveport, Louisiana, 339 ICC 65, 70 (February 2, 1971.)

Switching services offered by the various Portland carriers are described in detail on Exhibits 57 and 58 (App 351-352 and 355-356). The attached Portland area map was taken from the Oregon Public Utility Commissioner's (OPUC) Exhibit 58 and depicts the various areas now reciprocally switched by Portland carriers at no cost to the public except when the two limitations noted previously come into play.

As Exhibits 57 and 58 show, both SP&S and UP hold themselves out to switch traffic reciprocally to industries in the North Portland and Rivergate switching districts. Thus, Portland industries, including Rivergate and all other points in the North Pacific Coast territory are now on a competitive basis, and, with the exceptions noted, all switching charges are absorbed and all industries, including those in Rivergate, now have the single-line service of all railroads serving Portland, Oregon.

3. The Examiner's Basic Errors

The examiner made two fundamental errors upon which he structured his ultimate findings and proposed order.

(a) His Double Standard.

In making his findings, on virtually every issue in this case, the Examiner discussed public interest on the basis of an assumed Rivergate development. However, when considering congestion, impairment and interference in the operations of applicants he looked to

conditions as they exist today. In adopting this approach, the Examiner accepted general hypothetical testimony of the Port's supporting witnesses concerning their plans for Rivergate without considering the detailed and substantial testimony showing the adverse effect SP and Milwaukee use would have on the present operation of North Portland interchange and intervening trackage and the costly and dangerous congestion such use would create.

(b) His One Terminal Theory.

On pages 36 and 37 of the Examiner's Report, he concluded that the "factual reality evident points to an industrial transportation area which in the best public interest can be treated only as one transportation terminal entity" (App 116). This was based in part on his conclusion that the present and future traffic patterns in the entire Portland area must be considered. The record has never supported such a conclusion since evidence of present and future traffic has been limited solely to what is now handled by Peninsula and the projections offered by the Port's witnesses. There was no evidence of traffic levels or traffic patterns from any of the other many points within the greater Portland area.

The one transportation terminal entity theory was and is factually inaccurate, yet it was basic to the Examiner's conclusion that the Milwaukee and SP should be included in the ownership of Peninsula and should be given trackage rights to connect directly with Peninsula.

This is the position in which the Commission found itself when the case reached it on exceptions. Its re-

versal was based largely on the two errors just noted. We will show that the Commission has proceeded in accordance with law, its findings and conclusions accord with statutory standards and are supported by substantial evidence. Its order should be upheld. See *Northern Lines Merger Cases*, 396 US 491, 503 (1970).

QUESTIONS PRESENTED

Question 2 in the Brief of Appellants was not raised in the Jurisdictional Statement and under Rule 40(1)-(d), the arguments in support of it should be disregarded. Appellants made no argument of issues under Question 2 in the Jurisdictional Statement and they should not now be allowed to "smuggle in" additional questions. See *Irvine v. California*, 347 US 128, 129 (1954).

The argument contained on pages 30 and 31 of Brief of Appellants, all of the Supplemental Brief of appellant Chicago, Milwaukee, St. Paul and Pacific Railroad Company, and pages 25 through 32 of the Brief of the United States should therefore be stricken from the record.

Since the United States is cast in a role supportive of appellants[5] it cannot unilaterally attack the decision below with new grounds not raised by appellants. Therefore, any questions raised by the United States outside of those raised by appellants in the Jurisdictional Statement should likewise be disregarded.

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[5]Rule 10(4) provides in part: ". . . but appellees who support the position of the appellant shall meet the time schedule for filing papers which is provided for the appellants, except that any response by such appellee to a jurisdictional statement shall be filed as promptly as possible after the receipt of the jurisdictional statement."

ARGUMENT

Summary

1. Appellants seek to have this court reweigh the evidence behind the Commission's Section 5(2) public interest determinations under the guise that certain erroneous legal tests were applied in approving control of Peninsula subject only to standard traffic, operating and employee protective conditions. We contend the Commission gave full consideration to all facets of the appellants' case and decided it by applying a proper interpretation of the law to the evidence at hand.

A. The Hearing Examiner's recommendation was based on inconsistent and unsupported theories, one where he employed a double standard as previously explained, and another based on a terminal entity completely at odds with the facts. The Commission's reversal corrected these two errors and as a reading of the report showed, the Commission was completely aware of Rivergate's location, potential and needs. Appellants' proof centered on the present and future transportation requirements of Rivergate, though two of the three shippers supporting inclusion were in a section of Rivergate which could not be reached by Peninsula. The evidence as a whole did not support any railroad benefit or public need which could not be fulfilled by the granting of the SP&S-UP application. The passage of ownership of rail property from the noncarrier United to the lines serving the property coincides with a long and rational line of prior Commission decisions, and it was conditioned on the maintenance of Peninsula as a separate nondiscriminatory entity. Connecting carriers

and the public will gain by having experienced railroads take over the management of Peninsula, and these carriers stand committed to run Peninsula without preference, prejudice or discrimination.

B. The Commission's correction of the Examiner's erroneous "one transportation terminal entity" conclusion merely brought the decision in line with the truth. The effect was to advise appellants that the granting of their wishes could not be based on a false premise. The concept of a single, unified terminal, whose boundaries are undefined, simply could not be built solely on the presence of SP and Milwaukee in the general area. As the attached Portland print shows, definite areas of service have developed over the years. If presence in any part of that area can be used to reach Peninsula, this will promote efforts to retaliate by seeking to extend into adequately served territories. The rejection of this false theory was not, however, the crux of the Commission's decision. Later, in its report, the Commission clearly shows that it based its denial of inclusion not on the lack of one transportation terminal entity, but rather on the lack of public interest, giving full consideration to the classic standards set forth in *New York Central Securities Corp v. United States*, 287 US 12, 25 (1933).

C. The Commission's finding that SP's and Milwaukee's proposed connection with Peninsula amounts to an invasion of territory is factually sound. This finding is appropriate and completely applicable in this proceeding since both Milwaukee and SP seek to extend their service into an area already adequately served.

Whether this is done through construction of track or extension of operations via trackage rights or use of terminals the invasion of territory concept is the same. In this proceeding, substantial evidence supports the finding that SP&S and UP have in the past and can in the future render adequate, efficient and economical service to the area involved. Under these circumstances their territory must be protected against attempts to "shotgun" into areas already adequately served especially when invasion would impair the ability of SP&S and UP to handle their own business.

2. BN is willing to permit Milwaukee use of the North Portland Yard to afford a direct connection with Peninsula but continues to oppose Milwaukee's equal ownership of Peninsula stock. Union Pacific is willing to grant such use provided (a) BN handles Milwaukee traffic as its agent, and (b) Milwaukee relinquishes its request for inclusion in ownership of Peninsula. The balance of the argument on Milwaukee's position is pertinent only if Milwaukee refuses this proposal.

3. The Commission appropriately adopted a single public interest criterion in refusing to accept Milwaukee's theory of the case. Nothing expected or given Milwaukee in the *Northern Lines* case was taken from it. Nothing in the decision supports the contention that Milwaukee is entitled to inclusion or to special treatment under Condition No. 24. Milwaukee service through North Portland to Peninsula is fully available though physically handled by applicants to and from North Portland. Milwaukee rates, routes, cars, solicitation efforts and all other single-line services are avail-

able now without the congestion additional Milwaukee movements at North Portland would cause. Public interest was properly decided and the specific contentions raised by Milwaukee and the United States form no basis for reversal.

4. Section 5(11) arguments of appellants show no defect in the Commission's handling of its responsibility as it pertains to this case. Clearly, the competitive effects are at a minimum since the decision effected no change in rail operations. The Commission thoroughly considered all the various proposals and supporting evidence before choosing the one best fulfilling the overall transportation policy. Findings in this regard meet the requirements of Section 5(11), have ample support in the record, and appellants' argument to the contrary is unconvincing.

5. The interpretation of Section 3(5) in this case coincides with the intent of Congress expressed in the Transportation Act, 1920, and the Commission's implementation of it in subsequent decisions. No proposal encompassing the avoidance of unnecessary expense from duplicating services was present here. The Commission correctly found SP is not entitled to serve Peninsula or Rivergate directly. These points, served through SP&S and UP, are six miles from SP's nearest track. Appellants raise no real protest to this basic finding which leads to the inevitable conclusion that there are no grounds for authorizing the requested common use.

1. The Commission correctly applied the public interest criteria of applicable statutes as supported by the evidence in this proceeding.

In cases such as this where a noncarrier is no longer interested in owning rail property, the Commission has consistently found that it is in the public interest for that property to pass to the ownership of lines serving it. See *S. & A. Ry. Co. Control*, 282 ICC 390 (1951); *Detroit T. & I. R. Co. Control*, 275 ICC 455 (1950); *Illinois Northern Ry.*, 275 ICC 803 (1949); and *Niagara Junction Ry. Co. Control*, 267 ICC 649 (1947).

The Commission's approval of the title proceeding in Finance Docket No. 24679 followed this line of cases. Appellants have not taken issue with the following basic public interest finding:

> "The record establishes that the purchase of Peninsula by SP&S and UP will be in the public interest. The joint applicants now connect with Peninsula and the present service to its industries will be unaffected by the substitution of joint applicant's control for that of United. Furthermore, it will be in the public interest for control of Peninsula to pass from the noncarrier, which no longer desires it, to carrier auspices and on this record the most logical owners would be Peninsula's connecting carriers . . ." (App 25)

(a) The Commission correctly determined public interest after giving full consideration to the effect all proposals would have on the public as a whole.

Appellants argue that the Commission took a narrow view of Peninsula alone in resolving the public interest factor, which appellants say is centered around "the great public interest in the development of Rivergate as

a key project in the present and future commercial and industrial development of Portland, the State of Oregon, and in truth the Pacific Northwest" (App Brief 13).

The Examiner (App 116) made a superficial analysis of "the involved Portland area, including land and transportation facilities of the public, of all types of carriers there, and of the shipping industries." He then found directly contrary to any evidence of record that:

> "The factual reality evident points to an industrial transportation area which in the best public interest can be treated only as one transportation terminal entity." (App 116)

On exceptions appellees pointed out that the evidence in the case was limited to the past and present use of North Portland and Peninsula as well as the projections of future growth within the Rivergate area. The Examiner's failure to decide the case within these parameters caused the Commission to make the following finding:

> "... Therefore, we do not agree with his conclusion in this regard and for that reason we consider Peninsula, rather than the entire Portland area, to be the focus of our attention in resolving the public interest factor." (App 30)

The Commission's reference to Peninsula obviously meant the Peninsula-Rivergate area and the need of Rivergate for rail service now and in the future. The report read as a whole clearly supports such a full-blown view of public interest.

The Commission's report first noted that the matter was before it on exceptions to the Examiner's Report

and Recommended Order, reviewing the various applications and petitions it had to decide (App 12-13). The Commission then adopted the Examiner's detailed description of rail parties, their local operations and their positions in the case (App 14).

The Commission next described Peninsula and the interest of the Port, SP and Milwaukee in the purchase of Peninsula's control by SP&S and UP, noted the physical characteristics of the property and reviewed in detail the industrial development on the west or Willamette River side of Rivergate. The position and extent of Crown's pole yard was also described as was the location of the thirteen industries served from Peninsula's main line. The existing access route from the south and the recommendations for a northern route into Rivergate from the SP&S main line extension or an extension of Peninsula's trackage into the area was also noted (App 15).

Nor was this all the consideration given to evidence of Rivergate. Under the heading, *The Proposed Transactions* (App 17-21), the Commission made extensive findings on the positions of the various parties and adopted verbatim five pages of the Examiner's Report instead of repeating them.

The Examiner's review of evidence by witnesses of Crown, Oregon Steel Mills (Oregon Steel), and Collier Carbon and Chemical Company (Collier), was also adopted verbatim by reference (App 61-65). Traffic estimates for all of Rivergate became part of the record in the same way (App 57-59).

About all of the Examiner's Report which the Commission did not adopt were his Discussions and Conclusions and Ultimate Findings. Since appellants appear satisfied with the Examiner's analysis of the evidence, their argument that the Commission failed to consider fully the positions of the parties seems strikingly inconsistent.

A further thorough and independent review of the needs of shippers was made by the Commission, and the contentions of the public agencies on briefs and replies to exceptions were thoroughly considered prior to the Commission's concluding that shippers and public agencies "motivated by a desire for the service of as many railroads as possible into Rivergate." (App 33) This alone was not enough for inclusion of SP and Milwaukee in the proposed transaction.

Both on Brief and Joint Exceptions, UP and SP&S challenged the public agency evidence by questioning the reliability of the Port's traffic projections (R 35, p 47 and R 39, p 22). We noted that the projections were highly speculative since they turned basically on Witness Plowman's prediction that by the year 1990, western railroads would generate in ton miles twice the volume of 1966. How this would relate to Rivergate, much less Portland, was never established save by the bald assertions of one man. None of the 21 exhibits offered by the other Port witness was ever correlated into industrial development on which traffic projections could be based. This evidence itself could not be turned into reliable evidence of transportation needs.

Nonetheless, appellants contend that the unspecified needs of shippers who may locate in the future in Rivergate, and of the shipping and consuming public as a whole, should have dominated the Commission's consideration of its issues (App Brief 15). The simple answer is that it was considered along with all other evidence of record before the Commission reached its decision.

Whenever new service is instituted to take care of potential growth in an area already adequately served by other carriers, the Commission has followed the principle that a strong and urgent need for the proposed service must be demonstrated.

> "None of the reasons presented by the applicant in support of the application under the circumstances shown indicates a strong or urgent need for the proposed service. See *Utah Terminal Ry. Co. Application*, 72 ICC 89 (93), 79 ICC 187, and *Galesburg & G.E.R.J Co. Construction, supra* (477). In *Clintonville Transfer Line v. Public Service Commission*, 248 Wis. 59, 21 NW(2) 5, cited by the applicant as supporting a contrary view the Wisconsin Supreme Court held:
>
> > " 'If there was a strong urgent need for the connection here sought then there was a necessity for it . . .' " *Northern Pacific Ry. Co. Construction*, 295 ICC 281, 295 (1956).

The Port's evidence regarding Rivergate simply did not rise to the level of a "strong and urgent need."

No evidence supports appellants' contention that granting of ownership and direct access to SP and Milwaukee will itself improve service. These carriers will accumulate cars for movements to North Portland for

interchange with Peninsula in much the way these cars are now accumulated by appellee rail carriers. This was demonstrated by the testimony of SP Traffic Manager E. C. Ordway (App 515-516).

Appellants scrupulously avoid discussion of how sorting, accumulating, inspection, repairs and other services could be conducted so as to actually improve operations. Since UP and SP&S will continue to handle their own traffic to and from Peninsula, if SP and Milwaukee were included, switching now performed by two lines would be carried out by four carriers, thus instituting a wasteful duplication of service with its attendant adverse effects which would tend to promote a poor rather than good service.

Car supply would plainly not improve by inclusion, as appellants assert, since rail cars are already furnished by SP to Peninsula and Rivergate industries (App 580). The Milwaukee anticipated it would do the same once it instituted service to Portland (App 529).

The so-called rate advantages of single-line service came into play by the assertion of SP that it was unwilling to extend all rates to Peninsula industries unless it directly connects with that line. Right now, SP could remove any rate disadvantage if its management wanted to, subject only to the requirement that the remaining rate is compensatory (App 513, 521). The application of Milwaukee rates to North Portland is also strictly within its management's prerogative. No appellant has challenged this, and for good reason, because the so-called rate advantages simply do not depend upon the

inclusion of SP and Milwaukee in the ownership of Peninsula or in direct access to that line.

Appellants contend that supporting shipper evidence was treated by the Commission in a "somewhat slighting fashion" (App Brief 17) but they failed to give explicit examples of any unfair treatment whatsoever. Oregon Steel claimed a need for unit trains, yet invested $35 million in a section of Rivergate where unit trains cannot be handled via Peninsula. It selected Rivergate to take advantage of inbound water shipments of ore and to be near potential users of steel (App 63). The location of the steel mill had nothing to do with its Mount Shasta ore development (App 477) nor does the record establish that under four-railroad control the other three railroads would be willing for Peninsula to incur the expense of building rail facilities to implement a unit train, solely for the benefit of SP (App 32). The Commission's treatment of Oregon Steel's evidence is sound, and appellants' disagreement raises no substantial point for consideration.

Collier established a plant in the south part of Rivergate and sent a witness to support SP who could not even locate Peninsula in relation to Collier's plant (App 428-429). He had little notion of how Peninsula could be used by SP to serve Collier's plant; and the Commission's finding that Collier's support was based on the general supposition that the more rail service it had the better the service would be, is a complete and full analysis of Collier's testimony (App 33).

Appellants' so-called "unrefuted proof" (App Brief 17) of single-line benefits amounts only to a superficial recital of the usual maxims favoring single-line service contained in three paragraphs of five to six lines in the prepared statement of Crown's Assistant General Traffic Manager (App 302). Crown itself did not object to the Commission's treatment of its testimony when it filed its Petition for Reconsideration in this case (R 48). In that document Crown based its support on the hope of gaining a broader supply of an extremely scarce type of specialized equipment—drop end gondolas. The Commission, however, found no evidence supported this hope (App 32).

'Nor will the Commission's decision in any way inhibit the industrial growth of Rivergate. While SP's Manager of Industrial Development claimed his company would have no incentive for locating industries in Rivergate (App Brief 17, App 509-10), the witness for Collier refuted this statement.

When asked about aid rendered by SP in locating the Collier plant in Rivergate, Witness Sandell stated as follows:

> "Q. 'Was your plant located in its present position through efforts of the SP&S Railway, do you know?'
>
> "A. 'Yes, we have received assistance from the SP&S.'
>
> "Q. 'From the Union Pacific?'
>
> "A. 'Probably.'
>
> "Q. 'From the Southern Pacific?'

"A. 'Probably.'

"Q. 'Do you know, on those two probablies, do you know?"

"A. 'Yes, we have received assistance from all those railroads in locating plant sites for this particular project.'" (App 429)

SP Witness Linde admitted that SP had worked with several industries who are presently located in Rivergate (App 510). When an industry seeks a location in Portland, the Rivergate Industrial area becomes a natural topic of discussion. Witness Linde testified:

"And you did inform Mr. Sandell of the Collier Chemical plant . . . of the site at Rivergate."

"A. There is no industry I know of who would have to be informed about the presence of the Rivergate Industrial. All of those with whom we have dealt in the Portland area are already aware of it and it always becomes a matter of discussion." (App 510)

Appellants further contend that the Commission refused to consider their evidence on industrial development or to consider the Port's evidence "relating to Rivergate's importance, its traffic potential, its transportation needs, its traffic development and other factors bearing on the issues." (App Brief 19) This is simply not true. As mentioned a moment ago, the salient parts of the Port's case were reviewed in the Commission's report (App 14 and 15) as well as through excerpts from the Examiner's opinion which dealt with the positions of the public interveners:

"*Interveners.* — The petitions and applications of Milwaukee and SP are supported by the Port, the Portland Commission of Public Docks, City of Portland and the Oregon Commission. *Positions of these*

interveners are set forth in excerpts from the hearing examiner's report appended hereto and need not be repeated here." (App 21) (emphasis added)

In making its ultimate findings on the merits of the petitions for inclusion, the Commission further found:

> "We have thoroughly considered the briefs and replies to exceptions filed by the public agencies participating in these proceedings. Like the individual shippers supporting SP, the public agencies are apparently motivated by a desire for the service of as many railroads as possible into Rivergate." (App 33)

Thus we have demonstrated in this section that the Commission gave full consideration to the needs of the Peninsula-Rivergate area. The decision in this case is a proper interpretation of the evidence before the Commission, and there is no basis for asserting that either SP or Milwaukee must be included, since their inclusion would not improve service, increase car supply, be necessary for single-line rate applications, or be essential to enhance the growth of Rivergate.

(b) The Commission correctly concluded that adoption of the Hearing Examiner's treatment of the entire Portland area as "one terminal entity" would lead to more problems and litigation than the "divisive determinations" frowned on by the Examiner.

Appellants contend that the Examiner's erroneous "one transportation terminal entity" conclusion should have been followed and that the Commission was wrong in rejecting it (App Brief 21).

The Commission's findings involved under this argument read as follows:

> "The hearing examiner concluded that the entire Portland territory is an industrial transportation area which in considering the public interest can be treated only as one transportation terminal entity. He felt that 'divisive determinations would result in multiple problems and prolonged litigation not conducive to the future welfare, growth and development of the Portland area.' Therefore he bases his recommendations upon consideration of the involved area as a whole." (App 30)

The Commission then stated that mere presence in a general area does not give a railroad the right to serve all industries "anywhere within that undefined geographical area." (App 30) Based on the above, the Commission held as follows:

> "If we were to adopt the hearing examiner's conclusion, we would be providing grounds for every railroad in the undefined Portland area to seek to serve the stations and industries of any and all other railroads. The resulting situation could well give rise to more problems and litigation and be more disruptive of growth and development of the area than the 'divisive determinations' frowned on by the hearing examiner." (App 30)

In their argument on this point, appellants make no attempt to show that any evidence supported the Examiner's proposed treatment of Portland as a single transportation terminal entity. There is in fact no support for the Examiner's conclusion, and as the attached map shows, Portland is divided into a number of switching districts. Each Portland carrier has its own recognized territory. The Commission simply conformed its conclusions to the facts of record in rejecting the single transportation terminal entity theory.

Appellants attempt to argue that only under Section 5(2) proceedings can a carrier seek to serve stations and industries on lines of another carrier (App Brief 22). Here, both SP and Milwaukee seek to reach North Portland and connect with Peninsula under Section 3 (5). If Portland were denominated as a single terminal entity, and upon this basis Milwaukee and SP were granted rights to connect with Peninsula, an open season would be declared on all other terminals on lines of other carriers whether within or without the switching districts previously noted.

Granting of Section 3(5) applications are, in the main, dependent upon the existence of a definite union terminal operation within a defined terminal area as opposed to extending service into territory switched exclusively by other railroads. See *Chicago & Alton R.R. Co. v. T., P. & W.*, 146 ICC 171, 178-9 (1928), and *Use by Erie of Niagara Junction Ry. Co. Terminals*, 269 ICC 493, 498-9 (1947). Also, this could lead to attempts to reach out to industries already served directly by a competitor under the guise of an exempt Section 1(22) switch or industry track connection, *Nashville, C. & St. L. Ry. Construction*, 295 ICC 363 (1956), which was plainly in the Commission's thoughts when it made the involved finding (App 30).

This would not be limited to Portland but could affect the entire country. The requirement of the Interstate Commerce Act, that those carriers serving areas efficiently, economically and adequately be allowed to continue undisturbed, would be nullified; and indeed

many more problems and litigation would ensue than those "frowned upon by the Examiner" (App 30).

Appellants contend adoption of their views affords no opportunity for "shotgun terminal expansion" (Brief 22). They claim that neither SP nor Milwaukee have ever expressed a desire to serve points other than North Portland for a connection with Peninsula. This is inaccurate.

The Examiner noted that SP's application:

> "... in Finance Docket No. 24891 specifies no particular type of trackage rights sought. In the best public interest any authorization of proposed trackage rights should permit *full user rights*, with the attending assumption by the recipient thereof of the entire use and responsibility and the payment of compensation therefor on a numerical basis." (App 124-125) (emphasis added)

SP stoutly defended the Examiner's conclusion, which had the effect of opening all UP served industries between East Portland and North Portland (a distance of 6 miles) to SP's unfettered invasion. In SP's Reply to Exceptions (R 41, p 38), SP stated it sought common use of UP terminal facilities—not bridge trackage rights. SP unequivocally argued:

> "Union Pacific has been on full notice throughout these proceedings that the issue of full trackage rights over the involved Union Pacific accessorial tracks is at issue in this case, and the Examiner's grant of such rights cannot possibly come as an unexpected surprise to applicants." (R 41, p 38)

In this very proceeding SP has sought rights to serve all industries in the heart of UP's main Portland yard, and its current retreat from that position (see App Brief

in Opposition to Motion to Affirm, pp 4-5) cannot change this fact.

By the same token Milwaukee's counsel contended that they had not put any limitations on the use they intend to make of North Portland interchange yard (Tr 234), and the Milwaukee's management was authorized to file applications covering extensions and trackage rights into Portland including operating rights upon all terminal facilities in the Portland area. Whether or not this included Albina, Brooklyn, Guilds Lake and Barnes or other terminal facilities in Portland, Milwaukee's witness was unable to say (App 522-523).

If SP and Milwaukee are given rights to reach North Portland and connect with Peninsula based on a false "one transportation terminal entity" theory, what is to stop them from asking next to deliver their own cars to the Kenton industries, through Barnes Yard to Terminal 4, or to South Rivergate, or even for SP to cross the Columbia River to spot its own cars at industries in Vancouver? In other words, why shouldn't each carrier handle all its own cars to the industries on lines of all other carriers or build its own tracks to reach all industries wherever two or more lines serve a common point? The obvious answer is that impossible operating conditions would cause wasteful duplication, divided responsibilities, delays, damage to goods and dangerous working conditions which are avoided when standard switching interchanges take place.

In deciding the case as it did, the Commission followed the accepted method of terminal service as ex-

pressed by Union Pacific Witness G. H. Baker, when he stated:

> "Under ideal multi-line operations, when switching industries and interchanging traffic, a single carrier is designated as the switching line with as few delivering carriers as possible. This way the general public receives the best service and a minimum of disruption to its plant and the railroads involved are put to least expense." (App 276)

Acceptance of the Examiner's one transportation terminal entity could destroy this normal method of terminal operation, a fact which the Commission was quick to recognize.

(c) The Commission correctly concluded that a direct connection by SP and Milwaukee with Peninsula would constitute a new operation and thus an invasion of joint applicants' territory; and the Commission correctly concluded that the evidence failed to establish that the joint applicants, through control of Peninsula, cannot handle present and future traffic in the Peninsula territory adequately, efficiently and economically.

Appellants find fault with the following Commission findings:

> ". . . since neither SP nor Milwaukee now connect with Peninsula, and have never connected with it in the past, their direct service to Peninsula's industries over the objections of SP&S and UP would constitute a new operation and an invasion of the joint applicant's territory." (App 30)

Appellants claim by this finding that the Commission has improperly given this territory exclusively to joint applicants (App Brief 24-25). A reading of the several cases appellants cite (App Brief 25) in support of this contention will show that a present or prospec-

tive inadequacy of service must be established before a new operation may be certificated. The soundness of such decisions cannot be questioned here. Since appellant railroads plainly do not connect with Peninsula and thus directly serve the area, an inadequacy which gives rise to a need for more carriers must be proved by those seeking to extend new service. This clearly applies whether extension is under a certificate or as a condition to a Section 5(2) application.

In *Chesapeake & Ohio Ry. Co. Construction*, 267 ICC 665, 667 (1947), the Commission agreed a railroad in a given territory has a *prima facie* right to serve the area and direct service of another carrier will not be authorized without strong proof of further public need.

The Commission has found no such need in this proceeding and in fact has stated that the evidence of appellants, including all the evidence covering the Rivergate development, shows at best an ill-considered desire for as many railroads as possible in Rivergate. No evidence was offered to establish how this desire for service could be effected within the framework of a national transportation policy which is designed to foster sound economic conditions in the transportation industry. On this point the Commission found:

> ". . . Like the individual shippers supporting SP, the public agencies are apparently motivated by a desire for the service of as many railroads as possible into Rivergate. However, this objective, if achieved at the expense of the joint applicants as proposed in the instant proceedings, would be directly contrary to the precept of the Congress,

> embodied in its national transportation policy, to foster sound economic conditions in the transportation industry." (App 33)

The United States (USA Brief 19) cites "The Calumet Harbor" case, *Illinois Central R. Co. Construction & Trackage*, 307 ICC 493 (1959), and two other cases urging proof of present and future convenience and necsity in those cases can be substituted for appellants' failure to establish a public need here. In each case cited, construction of a direct connection to a developed port or industrial facility was permitted to fill a service void. Here, carriers seek not to construct their own track but to unilaterally use SP&S and UP trackage to interchange traffic at North Portland with Peninsula which someday may be used to switch within the yet undeveloped northern section of Rivergate. Furthermore, the Commission here found that public agency evidence failed to show that applicant lines cannot "handle present and future traffic in the Peninsula territory adequately, efficiently and economically" (App 33) and thus the cases are clearly not parallel.

No pat answer is found in *Consolidation of Railroads*, 159 ICC 522 (1929) (USA Brief 19), where the Commission also stated on page 523:

> ". . . In the face of such a great variety of circumstances and conditions, it is impractical to prescribe in advance a universal rule for terminal rail unification and operation. Each terminal and the properties serving it must be studied in light of its particular facts and a practical solution worked out with due regard to the property and other rights of all owners and users."

Here, it is important to note inclusion under Section 5(2) has usually been limited to protection of weak rail lines, *Pennsylvania R. Co.—Merger—NYC*, 327 ICC 475, 532 (1966), 328 ICC 304, 326 (1966), *B. & O. R. Co. v. United States*, 386 US 372 (1966), and *Penn Central Merger* cases, 389 US 486 (1968), and has been denied when those seeking it would suffer no traffic loss and inclusion would reduce incentive and actually frustrate management. See *Toledo, Peoria & Western R. Co.* Control, 295 ICC 523 (1957), sustained *per curiam sub nom Minneapolis & St. Louis R. Co. v. U.S.*, 165 F Supp 893 (4th Div. Minn. 1958) and affirmed 361 US 173 (1959). SP and Milwaukee offered no proof of need for protection, and four-way management of Peninsula would obviously reduce its effectiveness (App 19, 276, 418, 419).

The rule of transportation law which appellants contend has been misapplied was stated by the Commission in its report as follows:

> "... In the past, the Commission has usually held that sound economic conditions in the transportation industry require that a railroad now serving a particular territory should normally be accorded a right to transport all traffic therein which it can handle adequately, efficiently, and economically, before a new operation should be authorized. This conclusion is applicable not only with respect to existing traffic but also with respect to potential traffic and is generally also followed in proceedings involving motor carriers. See *Minneapolis, St. Paul & S.S.M. R. Co. Acquisition*, 295 ICC 787, 802, and cases cited therein." (App 30-31)

The Commission later applied this principle when it found:

> ". . . In our opinion, and we so find, the evidence offered by the three shippers supporting SP's position, as well as the evidence offered by the petitioners themselves, fails to establish that the joint applicants, through control of Peninsula, cannot handle present and future traffic in the Peninsula territory adequately, efficiently, and economically." (App 33)

Appellants base their claim of misapplication on what they say is a "profusion of evidence concerning a deplorably poor quality of service to and from Peninsula industries" (App Brief 27). A review of evidence on present and future service to Peninsula-Rivergate shows that such service is and will be adequate and that appellants' assertion to the contrary is incorrect.

Appellants' whole case on this point is founded upon the "30-hour average" which appellants contend is a "transit time" in interchanging traffic between SP-UP at Albina and UP-Peninsula at North Portland. The 30-hour average is not a transit time. It is the time required to perform all railroad functions in the interchange of Peninsula traffic and includes the yarding, sorting, inspecting, switching, accumulating and moving of cars in schedule service via Kenton to North Portland. It is in no way comparable to the SP theoretical "running time" for a direct round trip to North Portland, which includes none of the items just mentioned.

Cars coming to Albina are not pre-sorted, must be inspected and, if necessary, switched to repair tracks,

otherwise they are switched to designated tracks for outbound movement. Cars for Peninsula are placed in with Kenton traffic and may need reswitching to place them in the proper part of the transfer train (App 419-420). The UP-Kenton engine normally handles all North Portland traffic in two separate round trips daily on its "turn" through the Kenton industries because it is used to pick up and set out traffic interchanged at North Portland between the BN and UP. At the same time the Kenton engine interchanges the SP and UP traffic with Peninsula at North Portland. If there is a need for expedited service at North Portland, the Peninsula traffic is handled directly without taking the Kenton route (App 420-421).

Sixty-one percent of the traffic now interchanged at North Portland is between BN and UP and originates or terminates in the Kenton area of UP. The balance is line-haul to or from Peninsula via BN and UP as well as their connecting lines such as Milwaukee and SP (App 260). Accordingly, the method just noted affords a most economical service consistent with the present needs. It assures six scheduled stops daily at North Portland because of the numerous interchanges applicants make there (App 46).

All needs of the area can clearly be met by BN and UP and appellants' evidence offers no serious challenge. UP Assistant Superintendent R. B. Hardin testified that SP&S and UP can and will "furnish service as required" if Peninsula is used as a vehicle for service into Rivergate and that at the present service was meeting demands (App 574). The North Portland

Agent received only six or eight service complaints (App 364) on 7,600 to 8,600 cars handled through his station each year (App 260). Intervening shipper Crown, the only Peninsula shipper supporting SP and Milwaukee, had experienced no unusual delays at its pole yard located on Peninsula.

> "Q. 'Well, Mr. Krause, you mentioned being in competition. Have you made any inquiries as to the problems of your competitors in this area for large cars?'
>
> "A. 'No. I have not.'
>
> "Q. 'Would you feel that your delay is unusual as compared with other comparable industries requiring this type of car?'
>
> "A. 'I don't—I have no feeling about it because I have made no comparison.'
>
> "Q. 'Once the cars are there and loaded and they are loaded out, do you have any unusual delay in having those cars pulled from your industry?'
>
> "A. 'I haven't heard of any.' " (App 454).

Crown in fact has no basis for claiming deficiencies since it has no control over which railroad obtains the business. The routing of pole shipments is specified by the buyer and this also dictates the carrier from whom specialized equipment must be obtained (App 451-452).

SP's Witness Ordway claimed that he had received complaints concerning delays in service to North Portland as traffic manager for that railroad (TR 524). Yet, on cross-examination he could not state how many complaints he had received in the previous year, and he made no effort to contact officials of the SP&S and

UP in an effort to rectify any real or imagined service deficiencies (App 514). Neither UP General Manager G. H. Baker nor Witness Hardin received these or other complaints on service (App 398-399; 751).

The other shippers supporting SP, i.e., Oregon Steel and Collier are located in South Rivergate. Their plants were only under construction at the time of the hearing, and their testimony in no way could bear on the adequacy or efficiency of service between North Portland and East Portland because they would not use any such service.

Witness Mowatt, Deputy Sales & Service Manager for the Dock Commission, who appeared in support of a four-way ownership of Peninsula, offered as an exhibit a speech made at a conference called to discuss the implementation of the plan for absorption of reciprocal switching charges. Witness Mowatt had the following to say concerning the quality of service rendered by Union Pacific in South Rivergate and adjacent territories:

> "The physical switching within the Port's Rivergate Industrial District (South Rivergate), the Commission's Terminal No. 4, the Terminal 4 extension, the Port's Swan Island Industrial Park, and the Commission's Albina Docks, all located on the east side of the Willamette River, is performed by the Union Pacific Railroad. . . . The *Union Pacific Railroad, who perform the switching at Terminal 4, have (sic) also done a yeoman job, often going far out of their way to help us when the need arose.*" (App 247) (emphasis added).

Appellants have argued that a letter attached to Crown's Petition for Reconsideration is evidence that

SP&S and UP cannot and will not provide adequate and efficient service to Peninsula in the future (Jurisdictional Statement, p 14). The document involved, which is reproduced on pages 577 and 578 of the Appendix has no bearing on service via Peninsula, which appellants either inadvertently or otherwise failed to mention.

What the letter describes is service on traffic between Crown's Waterways Terminal in South Rivergate and Albina via the Union Pacific Barnes Yard. The Waterways Terminal is 3 to 4 miles from Peninsula (App 442), is not connected with trackage served by Peninsula, and receives switching from Union Pacific through Barnes Yard (App 233).

The letter itself portrays an efficient, economical and adequate service by tracing the procedure to be followed in handling SP cars from the time of order to return. When an excess of 25 outbound loads are tendered, UP will run a South Rivergate to Albina special, otherwise, UP will perform additional service for other shippers and receivers en route (App 577-578).

The Commission also correctly found that Willamette Wood Products, Inc., Morrison Oil Company, and Serendip Industrial Minerals of Portland, all support the application of SP&S and UP (App 21).[6] See Appendix 291-294 for the supporting statements of these Peninsula shippers, and pages 474-476; 484-497 for cross-examination thereon.

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[6]Five interested witnesses offered prepared statements in support of SP&S and UP with three actually testifying (R 27, Ex 30-34).

Appellants have ignored all of the foregoing testimony and concentrate their claim concerning a service deficiency on SP's Exhibit 45 and what they term to be the "unanimous agreement" of joint applicants and others (App Brief 27). What appellants term unanimous agreement on inadequate transit time was based solely on cross-examination questions which were never phrased to encompass the necessary railroad handling between the points involved and always dealt with running time.

Questions were phrased ". . . that it took 24 hours plus to move 6 miles . . ." (App 366). "That 30 hours or more from Albina to North Portland interchange is adequate service . . ." (App 431). "Or . . . do you consider 30 hours a reasonable time and adequate service to move cars a distance of about 5.2 miles . . ." (App 552). "Would it surprise you if I were to tell you it took 37 hours" to spot a car "on the Peninsula Terminal interchange track" (App 488).

The foregoing questions obviously dealt only with transit time of an engine and two or three cars with open track and not the railroading involved in handling an interchange move, with the attendant train preparation and car accumulation. The further questioning of Witness Nenow, the rail labor representative referred to by appellants, demonstrates this (App 552-554).

SP's Exhibit 45 purported to be a sample showing time lapse between the SP interchange with UP (or Portland Terminal-SP&S) and Peninsula. The exhibit itself clearly demonstrates that the use of average ex-

perience is of little or no value in determining sufficiency of service.

Exhibit 45 was a study conceived and prepared by SP in its effort to show poor service—not by shippers or consignees complaining of existing service. It covered 44 SP loaded and empty cars moved in the year 1967 and shows a time lapse of from 5 hours and 30 minutes up to 440 hours. The testimony of Witness Hardin, in which he reviewed approximately 20 of the entries on Exhibit 45, shows that a number of long delays were caused by mishandling of SP in forwarding proper information (App 572-573). In at least ten cases, cars were received at Albina on Friday or on a holiday and were not physically delivered until just prior to the next working day, an actual benefit to the industry (App 573-574). Three of those examined were tendered empty and were spotted ahead of the date they were ordered (App 575).

Shippers and receivers on Peninsula, and for that matter on any rail line, know the service available to them, that is, the time of day traffic is picked up and set out. In this case, with UP picking up around 6 a.m., shippers on Peninsula know that any cars spotted on the interchange track at 9:30 or 10 in the evening will not be picked up until the following morning. At least seven cars shown on Exhibit 45 are in this category. Lapsed time is therefore no basis for judging adequacy of existing service and standing alone is no criteria by which to judge the ability to meet future service needs.

The foregoing shows appellants offered no real evidence of deficient service. They did not and could not show that time lapse interfered with the orderly conduct of business by shippers and receivers who are aware of traffic schedules and know that expedited handling is available when they need it. The absence of evidence of shipper dissatisfaction underlines this fact.

In striking contrast to appellants' contention that the Commission has taken a narrow view of public interest, appellants have avoided any assessment of the adverse effect inclusion of access by SP and Milwaukee would have on all segments of the public.

On this point the Commission correctly found:

> "The adverse effect on SP&S and UP and the shippers dependent upon them for service of admitting SP and Milwaukee into ownership and control of Peninsula would outweigh any advantage accruing to SP, Milwaukee and the Rivergate industries of four railroad ownership." (App 33).

Appellants and USA limit comments on "adverse effect" to an inference that UP and SP&S do not compete with appellant railroads for traffic off their direct lines (App Brief 16) (Brief of USA 12). This is simply not true; for rail carriers serving an area in one way or another compete with all others for traffic routes either directly or through connecting lines, except in those few areas served solely by one railroad. None of SP's so-called "single line states" such as California, Arizona, New Mexico and Texas are solely served by that company. At any point where a competing line also serves,

competition exists and revenue loss, which is one adverse effect, could, in fact, be quite substantial.

Added congestion brought about by the wasteful and duplicative proposed service is the prime adverse effect of SP and Milwaukee inclusion. Congestion on applicants' lines was covered in detail before the Commission and the District Court. Witnesses Westergard, Baker, Hardin and Smith gave extensive testimony on the subject (App 277, 376, 554-555, 563-571). [See portions of Examiner's Report appended to the Commission's decision (App 48-52).]

In substance, this evidence demonstrates that the BN and UP main lines connecting and passing North Portland even under normal operations come under extremely heavy use (App 50). The exclusive UP facilities involved here are used to near capacity 24 hours a day (App 50).

If admitted, the presence of SP and Milwaukee would not permit a decrease in operations of applicant lines and would add substantially to the burdens just noted. Close coordination of operations between a minimum number of carriers must be continued to avoid costly and dangerous operating conditions and to maintain efficient adequate service not only to the Peninsula-North Portland territory but also to other segments of the public relying on all Portland railroads for their transportation requirements (App 555, 567-569).

Appellants' evidence has failed to meet the burden which is clearly upon them and the Commission's finding on this point is correct.

2. Service Proposal to Milwaukee for North Portland.

On the record, Milwaukee suggested as satisfactory service for a connection with Peninsula that BN be permitted to handle its cars on a contract or "puller arrangement" (Milw Brief 18) if congestion at North Portland would not permit Milwaukee's direct handling. As noted before, congestion in and around North Portland now slows operations in the area (App 50, 376-377, 563-564). However, such an agency arrangement must be based on a plain right of Milwaukee to serve North Portland directly itself, as an agent cannot perform for another carrier a service which the principal carrier could not do for itself.

The physical movement by BN of cars for Milwaukee would be virtually identical whether the service is performed under a contract switch, absorption of the tariff switch or joint through rates or routes. Milwaukee presently has joint through rates and routes available. It can also reach Peninsula industries by absorbing switch charges.

UP and BN do not concede that Milwaukee now physically connects with Peninsula (without which the contract switch method is not available). BN is willing to permit Milwaukee use of the North Portland Yard including connecting tracks to afford an interchange with Peninsula on the usual joint facility basis, but continues its opposition to Milwaukee's inclusion as a joint owner of Peninsula. Union Pacific is willing to join in such proposal for the use of the North Portland Yard provided (1) Milwaukee cars are handled by BN as Mil-

waukee's agent, and (2) Milwaukee relinquishes its request for inclusion in ownership of Peninsula. With these trackage rights, Milwaukee could take advantage of any contract arrangement it has with BN, on its assumption of a fair portion of interest rental on the property open to its use as well as a prorata share of the maintenance and operating costs involved in handling the North Portland interchange with Peninsula.

Milwaukee would then have available direct service to Peninsula at a price it contends is necessary to be competitive, and applicants and Peninsula would not be subjected to additional congestion caused by Milwaukee's direct entry to the North Portland interchange. With the foregoing cost benefit, there is no reason why Milwaukee should be included in the control of Peninsula.

The following portions of this brief, directed at specific contentions of Milwaukee, are pertinent only if Milwaukee refuses to accept this proposal.

3. The Commission correctly decided Milwaukee's Petition for Inclusion under the same public interest criteria as the Petition and Application of Southern Pacific rather than as a petition to carry out the provisions of Condition No. 24 in the Northern Lines Merger.

This section answers pages 30 and 31 of the Brief of Appellants, the Supplemental Brief of Appellant Chicago, Milwaukee, St. Paul and Pacific Railroad Company, and pages 25 through 32 of the Brief of the United States. As we have previously pointed out, page 10, *supra*, none of the issues raised under this heading was noted or argued in the Jurisdictional Statement and,

pursuant to Rule 40(1)(d), they should be disregarded. Nonetheless, we propose to briefly state our position in support of the Commission's handling of the Milwaukee's petition in this proceeding.

The appellants and the United States contend the following excerpts from the Commission's report are erroneous:

> "With respect to Milwaukee's petition, we wish to point out that this case cannot be viewed as part of the general realignment of western railroad competition resulting from the Commission's approval of the *Northern Lines* merger. Condition No. 24 of the *Northern Lines* case grants Milwaukee the right of access to Portland and the right to serve industries therein; however, this condition is applicable only to *Northern Lines* trackage and territory. The condition is silent with respect to trackage and territory in which other carriers, such as UP, have a joint interest and the effect of the condition upon such joint trackage and territory was not presented to, nor considered by, the Commission. Furthermore, the instant application and Milwaukee's petition for inclusion therein, were not filed until after the record was closed in the *Northern Lines* case, and not until long after the *Northern Lines* applicants had agreed to Milwaukee's request for imposition of condition No. 24. Thus, the purchase of Peninsula by the joint applicants was not within the contemplation of the Commission at the time condition No. 24 was imposed. Milwaukee's inclusion in that purchase cannot, therefore, be considered to implement that condition; and a denial of its petition for inclusion would take nothing from Milwaukee that it was granted in the *Northern Lines* case nor be contrary in any way to the spirit and intent of the Commission to accord Milwaukee the right of access into Portland over *Northern Lines* trackage. Accordingly, we consider the petition of Milwaukee under the same public interest

criteria as the petition and applications of SP, rather than as a petition to carry out the provisions of condition No. 24[10] (App 29).

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[10]Upon completion of litigation in the *Northern Lines* case and consummation of that merger, Milwaukee may wish to seek relief from the Commission in that proceeding to determine the relationship of condition No. 24, if any, to Peninsula's tracks which would at that time be partially owned by the Northern Lines."

As the last sentence of the foregoing quotation states, Milwaukee's petition was judged on the same public interest criteria as the petitions and applications of SP rather than as a petition to carry out the provisions of Conditions No. 24(a). The Milwaukee contends the Commission erred and in effect modified Condition 24 (a). This we urge is simply not correct.

Condition No. 24(a) provides:

"24. At the request of the Milwaukee, presented in writing not more than 6 months after date of consummation of the unification authorized herein or not more than 6 months after the effective date of any certificate or order of this Commission:

"(a) Permitting that railroad to extend its operations to Portland, Oreg., and to acquire trackage rights over the line of NuCo between Longview Junction, Wash., and Portland, Oreg., NuCo shall grant to the Milwaukee, upon such fair and reasonable terms as the parties may agree or as determined by this Commission in the event of their inability to agree, trackage rights to operate freight trains over NuCo lines between Longview Junction and Portland, including the right to serve on an equal basis all present and future industries at Portland and intermediate points and the use of NuCo facilities at Portland necessary for the switching of traffic to other railroads and industries. NuCo shall maintain Portland as an open gateway on a reciprocal basis with the Milwaukee to the same extent as with other connecting carriers."

The contract behind this condition was placed in evidence by Milwaukee Witness Hayes (App 332-337), and the part here pertinent reads:

> "1. *To the extent that NuCo and SP&S can do so it will grant to Milwaukee trackage rights over the present Northern Pacific and SP&S tracks* between Longview Junction, Washington and Portland, Oregon including all main, second main, passing, and industry tracks . . . and the right to construct at its own cost any necessary crossovers to enable the Milwaukee to operate freight trains, engines, and cars between Longview Junction and Hoyt Street Yard . . . with the right to handle freight traffic to and from Longview Junction and Portland and all intermediate points regardless of the origin or destination of said traffic." (App 333-334) (emphasis added).

It was pursuant to the foregoing agreement of BN and Milwaukee that the Commission, in the *Northern Lines* case, adopted Condition 24(a) permitting Milwaukee to extend its operations to Portland, Oregon. See *Northern Lines Merger* case, 331 ICC 228, 281. Thus, the contract and condition must be read together in determining what the Commission granted Milwaukee in the *Northern Lines* case.

The Milwaukee does not, and of course cannot argue that either Condition No. 24(a) or the contract expressly requires Milwaukee's admission to all industries in the Portland area. The fact is, as correctly found by the Commission, the rights which the Milwaukee received in the *Northern Lines Merger* were limited to trackage rights on tracks unilaterally owned by the merged Northern Lines. Not only is this fact clear from

the terms of the condition itself, but it is also clear from the contract which was made between Northern Lines and the Milwaukee implementing Milwaukee's entry to Portland.

Therefore, the Commission was clearly correct when it found:

> "The condition is silent with respect to trackage and territory in which other carriers, such as UP, has a joint interest and the effect of such condition upon such joint trackage and territory was not presented to, nor considered by the Commission." (App 29).

The other findings that purchase of Peninsula was not within the contemplation of the Commission at the time Condition No. 24 was imposed and, therefore, Milwaukee's inclusion cannot be considered to implement that condition are likewise without fault.

The way was left open to the Milwaukee to seek relief under the Northern Lines docket. This was a completely reasonable approach in an order which speaks as of June 6, 1969, since at that time the Northern Lines case was before this court (reaching decision on February 2, 1970, with the merger itself being implemented one month later). There was no certainty as to the outcome of the Northern Lines case at the time the Commission's order was written in Peninsula. The Commission thus afforded Milwaukee an unlimited opportunity to resolve any uncertainty on the record made in support of Condition No. 24(a). Nothing in the Commission's treatment of Milwaukee inhibits its right gained through Condition No. 24 to serve all industries

in Portland including those of Peninsula through the normal methods Milwaukee anticipated would be available to it (App 532). There is thus no basis for finding fault with the Commission's decision pertaining to Milwaukee's Petition for Inclusion.

Milwaukee raises a number of specific arguments which appellees propose to answer in the order presented in Milwaukee Brief.

(a) Implementation of Condition No. 24 of the Northern Lines case does not afford Milwaukee a direct connection with Peninsula.

Both Milwaukee and the United States in their briefs take the position that since Milwaukee's entry to Portland, it directly connects with trackage owned by Peninsula. At page 8 of the United States' Brief is the following statement:

> "The condition (set forth at A 327) provides that Milwaukee shall have direct access on an equal basis to Portland and Portland industries including SP&S tracks which include the track leading to the connection with Peninsula Terminal."

At page 30, this statement is found:

> "If Burlington Northern alone had applied for leave to acquire Peninsula, Milwaukee would plainly have been entitled under Condition 24(a) to reach Rivergate directly through it."

The Milwaukee Brief at page 8 states:

> ". . . Peninsula is an independent terminal railroad whose tracks connect with the Burlington Northern-SP&S main line double tracks extending between Longview Junction and Portland over which Milwaukee proposed to operate its own trains, engines,

cars under its own tariff schedules and billing pursuant to said Condition 24(a)."

Milwaukee also wrongly claims on page 21 of its Brief:

"Upon extension of Milwaukee's operation to Portland in strict compliance with Condition 24, *using only BN trackage*, Milwaukee would directly connect with Peninsula . . ." (emphasis added).

The foregoing contentions clash directly with the facts in this case. Furthermore, they are in direct contradiction of prior statements of Milwaukee in pleadings to the Commission in this proceeding.

For example, in the Milwaukee Supplement to Petition for Inclusion, paragraph V, it stated:

"The intervening trackage between the Peninsula Terminal Company trackage and the SP&S main line, known as North Portland interchange tracks, is shown on map marked 'Exhibit No. 6' attached to the application in the instant proceedings by purple and by yellow lines. *The tracks shown in purple are jointly owned by SP&S, NP and the OWR&N*, and tracks shown in yellow are jointly owned by SP&S, NP, OWR&N and Peninsula Terminal Company." (App 182)

This was not a one time concession by the Milwaukee for in its Brief to the Examiner, it stated:

"If the Milwaukee were not permitted to stop at North Portland to set out and pick up cars for Peninsula, the Milwaukee could contract to have them handled on an agency basis as SP&S does for the GN and NP now. (Tr 109-110). This, however, requires that Milwaukee have the trackage rights because it is fundamental that a carrier cannot have an agent do what it cannot do itself. (Tr pp. 111-112, 164-166)." (R 31, p 45-46).

Also in its Reply to Exceptions, the Milwaukee stated:

> "The interchange tracks are connected to the SP&S main line by a single track extending from a turnout located at Railroad Engineer's Station 92+99.5 to a connection with the interchange tracks jointly owned by Peninsula located at Engineer's Station 89+40.0, a distance of 359.5 feet. This track is owned jointly by the OWR&N (UP), SP&S and Northern Pacific (Ex 26, NSW-1)" (R 45, p 6).

Also, in the cross-examination by Milwaukee counsel of applicants' witnesses, it recognized that the single connecting track, designated in purple on Exhibit 6 to the application and Exhibit NSW 1 (App 273-274), is owned jointly by SP&S-NP and OWR&N (UP) and that Peninsula has no interest therein (App 369, 375, 391 and 438). The attached North Portland-Peninsula print also clearly shows this. Since Peninsula has no ownership in the connecting line, it has no right to reach the main line without permission of the owners.

Conversely, upon entry to Portland, Milwaukee has no right to reach the lines of Peninsula without permission of the owners of the single connecting track. This, however, does not keep Milwaukee from making its own Portland rates and applying them to Peninsula industries through switching absorptions.

Milwaukee first raised the contention that it could connect with Peninsula upon entry to Portland in paragraph IV of its Petition for Inclusion (App 164), and UP denied such connection would exist in paragraph IV of its Reply to that pleading (App 178). Clearly, the assertion is Milwaukee's burden to prove.

In its Petition for Reconsideration to the Commission, the Milwaukee asserted the fact that *Condition 24 is limited to trackage over which the Northern Lines have unilateral control because the Commission had no jurisdiction over Union Pacific* in the *Northern Lines* case. There, Milwaukee argued that the fact Condition No. 24 does not cover tracks at North Portland does not avoid the propriety or need to implement Condition No. 24 in this case (R 51, Argument No. 2, pp 4 and 18 ff).

Milwaukee stated:

> "Before making its reply to that Petition for Reconsideration and agreeing to support the Northern Lines Merger, the Milwaukee entered into an agreement with the Northern Lines setting forth, in general terms, a more definite statement of the conditions they offered. *Obviously, the Northern Lines could not offer the Milwaukee the use of tracks they had no right to unilaterally grant.* The Northern Lines simply offered all they could without the concurrence of some other independent railroad, and the Milwaukee could not in that case ask for more." (R 51, p 19). (emphasis added)

Milwaukee has inconsistently and incorrectly reversed itself on this point. Its argument before this court has no factual support, and whether based on the obvious failure of proof or the inconsistent failure to pursue the issue before the Commission, Milwaukee's argument here forms no basis for reversing the Commission's denial of Milwaukee's inclusion. Nor is there any basis for the United States' assertion that the Commission here seeks to limit "the obligation gravely imposed in *Northern Lines*" (USA Brief 29). The parties here and

in Northern Lines have always known the extent of the obligations under the merger. They coincide with what the Commission now finds. There is plainly no basis for charging a retraction on the promise of Portland entry since Milwaukee itself has never expected use of BN track under joint ownership.

(b) Milwaukee service to Rivergate and Peninsula industries is in no way dependent upon a direct physical connection with Peninsula.

Arguing a converse position (Milwaukee Brief 22), Milwaukee urges it must connect with Peninsula to establish rates and routes with that carrier via North Portland. SP has obtained the same result without connecting, through absorption of switch charges (App 285). Milwaukee can freely do the same on all existing and future Portland traffic.

The requirements of Section 1(4) and 3(4) of the Interstate Commerce Act pertaining to establishment and maintenance of reasonable through routes and rates without preference or discrimination are additional legal safeguards to insure that service of all Portland carriers will be available, as it is now, to Peninsula and Rivergate industries. These sections apply as well to short line wholly-owned connections as Peninsula would be. *Western Pac. R. v. U.S.*, 382 US 237 (1965). Besides these statutory provisions, the Commission prescribed, at the suggestion of SP&S and UP, the so-called standard traffic conditions. See *Detroit, T. & I.R. Co. Control*, 275 ICC 455, 492 (1950), and *Southern Pacific Company—Merger—Pacific Electric Ry. Co.*, 327 ICC 38, 40 (1964). The Commission modified the conditions by not

only requiring Peninsula as the acquired line to comply but also subjecting SP&S and UP to their provisions.

The conditions protect and keep open present routings and channels of trade; require neutral and nondiscriminatory handling of traffic; require that the present nonpartisan traffic and operating relationships existing between Peninsula and lines reaching Peninsula through the lines of SP&S and UP shall be continued; provide that all cars empty or loaded shall be handled indiscriminately; protect the right of industries to use present routes without restraint; AND provide that no routes may be closed without affirmative Commission action (App 35-36).

(c) The Commission's interpretation of Milwaukee's petition, neither confused the issues nor changed Condition 24.

Milwaukee next argues (Milwaukee Brief 25), without reference to the record, that the Commission was confused over what Milwaukee sought stating that "apparently, the Commission thought the Milwaukee's petition for inclusion was an attempt in this case to gain direct access to North Portland and Rivergate by operating its own engines over Peninsula's tracks." (Milwaukee Brief 26)

As to Milwaukee's petition for inclusion and the service sought to be rendered thereunder, the Commission found as follows:

> "By petition filed August 23, 1967, Milwaukee, under Section 5(2)(d) of the Act seeks inclusion in the transaction for authority (1) to purchase one-third of the capital stock of Peninsula . . .; (2) to pay one-third of the purchase price of two diesel locomotives . . ., and (3) to acquire trackage rights

over tracks owned jointly by the joint applicants and connecting SP&S with Peninsula." (App 13)

The Commission had clearly in mind what the Milwaukee sought and Milwaukee's contentions to the contrary simply have no basis in fact.

(d) The Commission approval of SP&S and UP control of Peninsula does not "block" Milwaukee from North Portland.

Here, Milwaukee maintains, again without citation to the record, that joint ownership of Peninsula will foreclose Milwaukee traffic from freely moving via North Portland (Milwaukee Brief 27). Plainly, appellees' objection to Milwaukee and SP gaining a direct entrance to North Portland is based on the burdensome operation it would impose.

When asked why he objected to Milwaukee's use of North Portland with its own engines and crews, SP&S Witness Westergard stated:

"A. 'I don't know how I can say it any differently than what I have said before, that there is an objection. The more movements in and out of those tracks, and I am not just thinking of movements within the trackage, I am thinking of the movements on the green track, every movement, whether it is one car or 50 cars, when you stop they interfere with other traffic that moved on the green track. The more movement there is, the more interference there is and the more congestion. It leads to more congestion.'

"Q. 'And the more business you have, that also leads to the same thing?'

"A. 'I say this even assuming that the business, that the carload traffic, is about the same, but if you

are handling it in two or three movements when you could be handling it in one, there are three trains stopping out there instead of one.'" (App 376).

Southern Pacific raised the same issue contending that SP&S and UP conspired to block it from gaining "direct access" to Rivergate.

SP counsel cross-examined Union Pacific Witness Baker as follows:

"Q. 'Mr. Baker, isn't it a fact that the only reason that the Union Pacific seeks to control the Peninsula Terminal is to block the other railroads serving Portland from reaching Rivergate?'

"A. 'No.'

"Q. 'If your answer is no, why do you object to Southern Pacific having direct access to the Rivergate area?'

"A. 'Because there will be congestion.' . . .

"Q. 'Let's go back. I asked you the question whether isn't it a fact that the reason Union Pacific seeks to control Peninsula is to block other railroads from having access to the Rivergate area. You say no, that is not the fact.'

"A. 'They have access.' (App 397)

* * *

"Q. (By Mr. Wilson) 'Are you telling me, Mr. Baker, that the Southern Pacific can operate into the Peninsula Terminal interchange tracks today?'

"A. 'You joined with us on the rates.'

* * *

"Q. 'If they can't operate out there, how can they serve the Rivergate area except through the Union Pacific?'

"A. 'That is the way you serve it now.'" (App 402)

Milwaukee next contends under *Chicago, Milwaukee, St. Paul & Pacific R. Co. v. United States*, 366 US 745 (1961), that Peninsula will not be required to join in rates and routes which will short-haul its parents. This argument is purely academic as in addition to switching/absorptions applicants are committed to show no partiality on rate matters toward connecting lines (App 285). Peninsula has since its inception openly made routes with Portland lines. Any refusal by Peninsula (whether independent or controlled) to afford all Portland carriers the same treatment would amount to an unlawful discrimination, and Milwaukee's argument based on the foregoing case is clearly inapplicable.

(e) The contention that the instant application was timed with intent to reduce the territorial scope of Milwaukee's rights in Portland deserves no consideration.

Milwaukee's contentions on this point (Milw Brief 29) were never presented to the Commission nor seriously pursued before the District Court. Beyond that, there is no proof of the inferred conspiracy to sabotage Condition No. 24 nor could there be any since none exists.

Purely and simply the Commission decided Milwaukee's contentions after reviewing the full public interest facets of the case; and dates on which the contract was signed, the application filed, or the *Northern Lines* case argued on reconsideration form nothing more than a specious argument.

(f) The Commission correctly found that granting of Milwaukee's petition would involve an invasion of territory.

Historical evidence describing the development of North Portland and Peninsula, coupled with a glance at the Portland area print attached to this brief, show that carriers in Portland serve distinct territories. The invasion of territory assertion has been covered in a prior section *(1 (c) supra)* and need not be repeated. Condition No. 24 and its implementation were purely permissive. Any rights afforded necessarily took effect only when Milwaukee had the power to act and actually started its Portland service. The contention that Condition No. 24 in effect "stopped the clock" on terminal changes at Portland (apparently on the date of ICC and not court approval) is thus patently erroneous.

(g) The Commission correctly placed the burden of proving contentions in Milwaukee's Petition for Inclusion upon that carrier.

Here, Milwaukee argues (Milw Brief 31) that by footnote to its report, the Commission shifted the burden of showing the relationship between Condition 24(a) and Peninsula trackage to Milwaukee.

The footnote in question reads as follows:

> "Upon completion of litigation in the *Northern Lines* case and consummation of that merger, Milwaukee may wish to seek relief from the Commission in that proceeding to determine the relationship of Condition 24, if any, to Peninsula tracks which would at that time be partially owned by the Northern Lines." (App 29)

The straight fact is that Milwaukee itself has admitted on this record that it can expect no rights in facilities in which BN owns only a partial interest.

There has been no collateral modification whatsoever of Condition 24; nothing has been taken from Milwaukee which it had a reasonable right to expect, and by operating into Portland it has open access to all industries in the greater Portland area.

In summary it should suffice to say that Milwaukee's contentions place its competitive self-interest above the interest of public shippers and receivers in an efficient, economical and adequate rail service. For these and other reasons noted above, they have no merit whatsoever.

4. The failure of the District Court to accept appellants' antitrust assertions does not sanction a violation of the antitrust laws.

This argument is based on Section 5(11) of the Act, and the parts involved here provide:

> "The authority conferred by this section shall be exclusive and plenary, . . . and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction involved or authorized under the provisions of this section shall be and they are relieved from the operation of antitrust laws and of other restraints, limitations and prohibitions of law, federal, state, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved . . ."

McLean Trucking Co. v. United States, 321 US 67 (1944), says that the Commission is "to estimate the scope and apprise the effects of the curtailment of com-

petition and consider them along with advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the overall transportation policy." (321 US at 87) Accord: *Northern Lines Merger cases*, 396 US at 504 (1970).

Of the many other cases also in accord, *Minneapolis and St. Louis R. Co. v. United States*, 361 US 173 (1959), stands out as bearing a factual similarity. There, two competing applications for control were filed as well as two requests for inclusion. See *T. P. & W.—Control, supra*, 295 ICC 523. There, as in this case, the Commission thoroughly reviewed the various proposals and their effect on competitive rail operations. In each case the object of the application remained a separate entity and no change in competition was effected.

Here, the Commission opened with a detailed review of the contentions of each of the applicants and interveners in this proceeding through its own analysis and through adoption of segments of the Examiner's Report (App 17-21). Though no mention was made of Section 5(11), the following resume shows that full consideration was given to any competitive changes brought about by the proposed transaction:

Some of the salient findings bearing on competition include: (1) That service by Peninsula to its industries "will be unaffected by the substitution of joint applicants' control for that of United" and that it will be "in the public interest for control of Peninsula to pass from the non-carrier, which no longer desires it, to carrier auspices and on this record, the most logical owners

would be Peninsula's connecting carriers." (App 25); (2) That since neither SP nor Milwaukee now connect with Peninsula and have never connected with it in the past, their direct service over objections of SP&S and UP would constitute a new operation and an invasion of territory (App 30); (3) That any increase of SP and Milwaukee in traffic would only be at the expense of joint applicants and railway employees whose jobs would be eliminated (App 31); (4) That four railroad ownership would not increase car supply or increase the chances of track realignment or other construction not beneficial to all owning lines (App 32); (5) That passage of control to applicants is consistent with past and present service rendered in the Peninsula area and that joint applicants have the ability to fulfill future requirements (App 25 and 33); (6) That the adverse effect on SP&S and UP and shippers dependent upon them for service, of admitting SP and Milwaukee to ownership and control of Peninsula, would outweigh any advantages accruing to SP, Milwaukee and the Rivergate industries (App 33); and (7) That evidence of shippers and public agencies fails to establish a present or future need for either SP or Milwaukee ownership of or connection with Peninsula (App 31-33).

Standard traffic, operating and labor conditions supported by applicants were also broadened and attached to the approval (App 35-37). Naturally, the findings in each case must coincide with the evidence and, here, as the foregoing shows, the Commission's decision as a whole provides all findings required by Section 5, including Section 5(11).

5. The Commission properly rejected the common use applications under Section 3(5) of the Interstate Commerce Act.

The conclusions here challenged provide as follows:

"*Common use applications under section 3(5).*—The intent of Congress in enacting section 3(5) was to provide a method of avoiding the necessity for incurring unnecessary expense in duplicating existing terminal facilities by a railroad entitled to serve a particular territory. Cf. *Use of Northern Pac. Tracks at Seattle by Great Northern*, 161 I.C.C. 699. For a more recent case, see *Seaboard Air Line R.Co.—Use of Terminal Facilities*, 327 I.C.C. 1, where one railroad was authorized to acquire common use of another's facilities in order to continue service to a port which had been removed to a new location.[11] In the instant case, SP is not entitled to serve Peninsula or Rivergate. Therefore, there is no question of avoiding costly construction from SP's present Portland terminus to Peninsula through the acquisition of the common use rights it requests. Accordingly, we find no ground for authorizing the requested common use.

"[11]This case was cited by SP in support of an allegation that an invasion of territory be accomplished by means of a section 3(5) authorization. Since the railroad acquiring the common use rights was actually serving the port involved, in the port's old location, and would continue to render the same service in the new location, there was no invasion of another railroad's territory and the cited case does not support SP's allegation." (App 34)

Appellants here have offered no cases or citations to show a contrary congressional intent and claim they can find no supporting legislative history.

Section 3(5) was part of the Transportation Act, 1920. Prior to that major revision, there was no requirement that terminals of one carrier be opened to use by another carrier unless willingly done. World War I and the experiences of Federal control led the Commission to

recommend to Congress a more liberal use of terminal facilities in the interest of free movement of commerce. This was done, in part, to encourage a voluntary and more economical use of existing terminal facilities through agreements between competing carriers. Section 3(5) was thus intended to open terminals insofar as it could be done reasonably and properly, considering the handling of commerce of the locality (see 1918 ICC Annual Report, p 6). Extending into yards to effect interchanges was not part of this section and was instead covered by a separate section now embodied in Section 3(4) of the Act.

The 1920 Act as a whole was intended to promote development and maintenance of adequate railroad facilities. Preservation of earning capacities and conservation of the resources of individual carriers was then a matter of national concern and it still is.

The building of unnecessary lines or rendition of unnecessary service was viewed as a waste of resources, the burden of which falls on the public. The act further recognized that competition may result in harm as well as benefit and that when a railroad inflicts injury upon its rival, the public usually bears the ultimate loss. See *Western Pacific v. Southern Pacific Co.*, 284 US 47, 52 (1931).

Furthermore, the cases cited in the report squarely support the requirement of prior service to a particular territory. In *Use of NP Tracks at Seattle by GN*, 161 ICC 699 (1930), the Commission plainly stated that had not GN already served the Terry-Union Avenue

district, GN use of connecting track would amount to an extension of line into territory requiring a certificate of convenience and necessity under Section 1(18) of the Act (161 ICC at 704). Section 3(5) relief thus was not available to GN to operate over the intervening trackage of NP until GN established that it already served that particular territory.

Seaboard Airline R. Co.—Use of Terminal Facilities, 327 ICC 1 (1965), affirmed in *Florida East Coast Ry. Co. v. United States*, 256 F Supp 986 (MD Fla. 1966), and also affirmed *per curiam* 386 US 8 (1967), stands for the exact proposition noted by the Commission. The decision was based on the need to continue service to a port at a new location. There was no invasion of territory involved and Section 3(5) was properly invoked.

Appellants' argument that reliance on the factors noted in the *Seaboard Airline* case "is a specious argument," at best, simply does not hold water. The doctrine of "follow the traffic" is well established in transportation law, though its application must clearly be warranted by the facts. A close scrutiny is required of particular service characteristics, involving the broad effects its application would have on the public generally. See *Smith and Solomon Trucking Company, Extension—Camden, N.J.*, 61 MCC 748 (1953), and *Smith and Solomon Trucking Co. v. U.S.*, 120 F Supp 277 (DCNJ 1954).

Erie RR Acquisition, 275 ICC 679 (1950), cited by appellants, actually strengthens the conclusion they seek to overturn.

There, Erie sought user and trackage rights to perform for itself service which the International Railway had for years rendered as its agent. The same service would be continued without an invasion of territory (275 ICC at 287-288).

Erie therefore is cut from the same cloth as the two cases cited by the Commission, and in each case no new line was authorized or duplicative service instituted under the pretext of a Section 3(5) terminal use. See *Chicago & Alton RR Co. v. T., P. & W. Ry. Co.*, 146 ICC 175, 179 (1928).

In short, Section 3(5) has never been used as a substitute for the certificate of convenience and necessity required under Section 1(18) which permits a new service into territory not adequately served. As this court found in *Texas & Pacific Ry. Co. v. Gulf, etc., Ry.*, 270 US 266 (1926):

> "If the purpose and effect of the new trackage is to extend substantially the line of the carrier into new territory, the proposed trackage constitutes an extension of the railroad within the meaning of paragraph 18, although the line be short and although the character of the service contemplated be that commonly rendered industries by means of spurs or industrial tracks." (270 US at 278)

The Commission's ruling on Section 3(5) is a logical interpretation in line with prior similar decisions. Where new service is extended into a territory, Sections 1(18) and 5(2) dealing with extensions and trackage rights come into play. Where avoidance of duplicative expenses is involved or a long standing traffic relationship is sought to be maintained, Section 3 (5) is the

proper provision. The Commission's decision on this point is clearly correct.

CONCLUSION

The Commission as final arbiter of public interest—subject to remand only if acting beyond the law or without sound evidence—has found that the public interest will be best served by granting the basic application subject only to routine conditions. The whole transaction with its many applications and interventions was reviewed and decided in an evenhanded manner in accordance with a proper application of the law. Under such circumstances, this court should sustain the decision of the Commission, as did the three-judge court for the District of Oregon.

For the foregoing reasons, appellees SP&S and Union Pacific respectfully submit that the judgment of the District Court should be affirmed.

Respectfully submitted,

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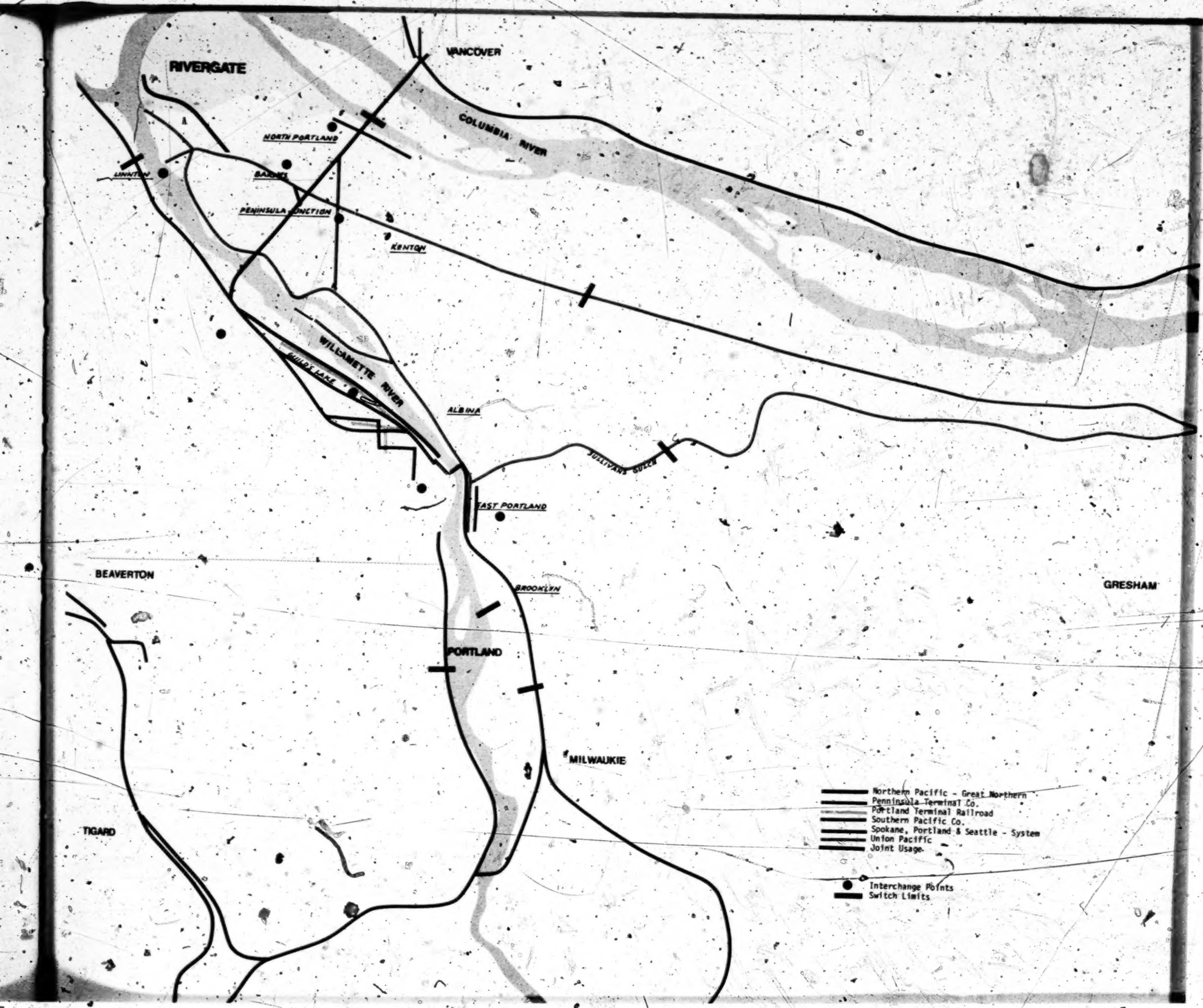
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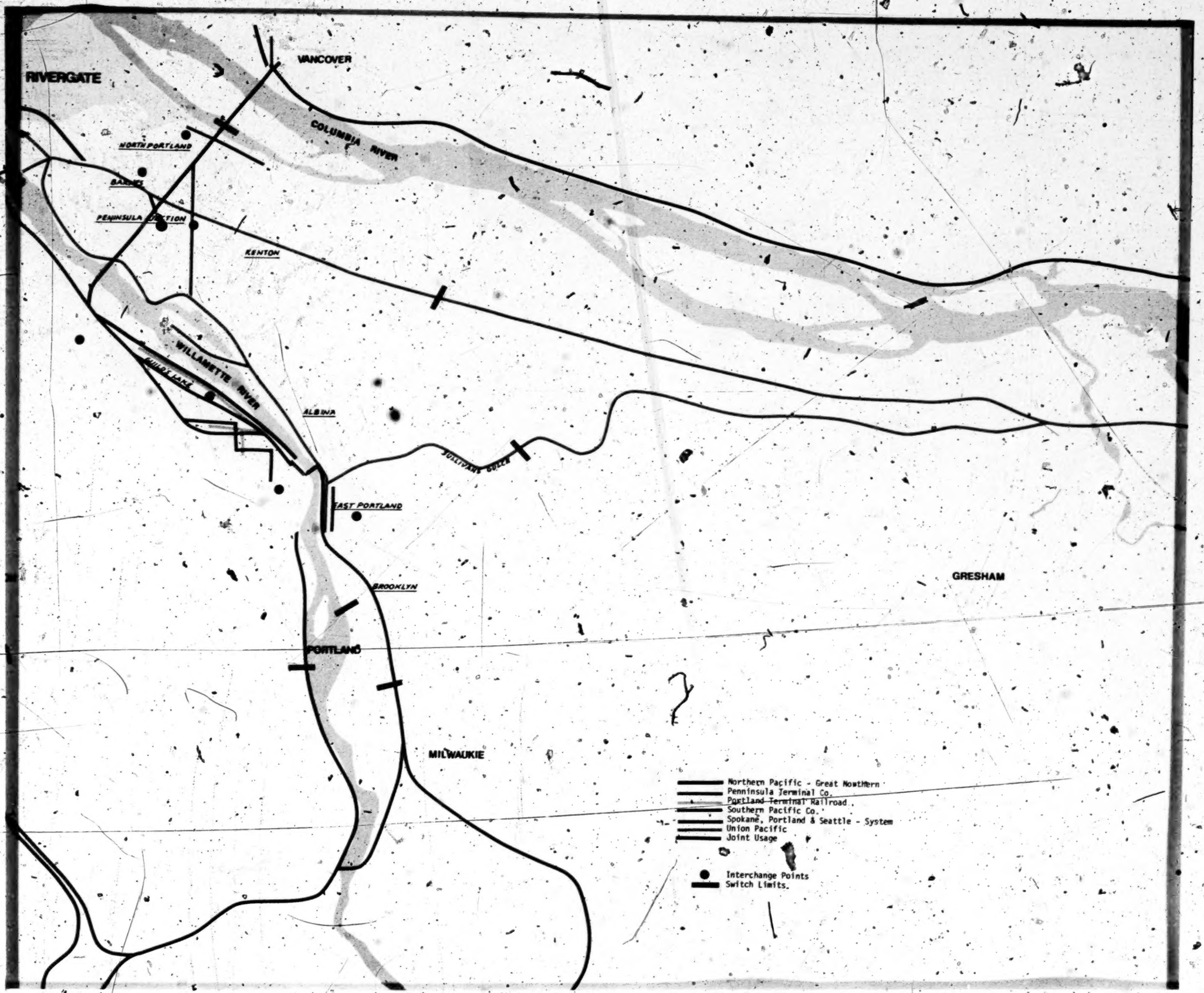
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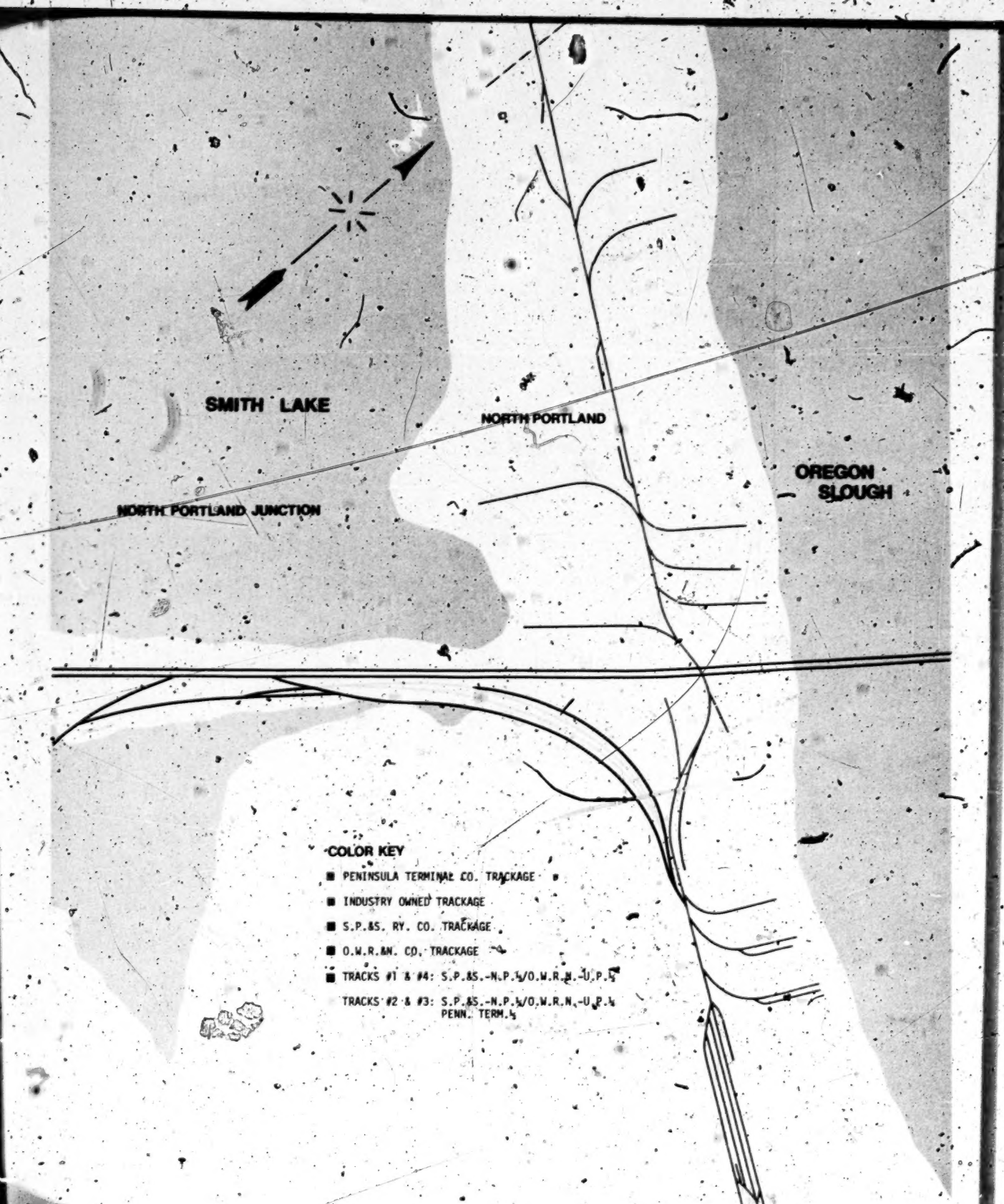
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TRACKS #2 & #3: S.P.&S.-N.P.½/O.W.R.N.-U.P.¼
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